Supreme Court, U.S.
FILED

94 366 AUG 25 1994

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

October Term, 1994

IN THE MATTER OF UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR., INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE CO., INC., and FOLDING CARRIER CORP.,
Debtors-In-Possession.

UNARCO BLOOMINGTON FACTORY WORKERS,
Petitioners,

v.

UNR INDUSTRIES, INC., et al.,
Debtors-Respondent,

and

TRUSTEES OF THE UNR ASBESTOS DISEASE CLAIMS TRUST,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PAMELA S. HOLLIS
(Counsel of Record)
HOLLIS & JOHNSON
1 Quincy Court
Suite 1204
Chicago, Illinois 60604
312-427-0700

JAMES WALKER
JAMES WALKER LIMITED
Box 3455
Bloomington, Illinois 61702
309-828-5044
Counsel for Petitioners
Unarco Bloomington Factory Workers

36 pp

I. QUESTIONS PRESENTED

A. Whether the Court of Appeals violated "Separation of Powers" by abstaining from Petitioners' appeals of UNR's bankruptcy reorganization, asserting that activated reorganization plans enjoy "Holder In Due Course" status, despite Petitioners' statutory right to the appeals.

B. Whether Article III of the Constitution of the United States and the Bankruptcy Code permit a federal court to bind unidentified, future victims of asbestos exposure to a company's reorganization plan.

II. PARTIES

Petitioners are (hereinafter referred to as "Workers"):

Edith M. Babb, individually and as administrator of the Estate of Joseph I. Babb, deceased; Dorothy Betts, individually and as administrator of the Estate of Elijah S. Betts, deceased; Terry Grabill, administrator of the Estate of Bernita Bragonier, deceased; Helen Bratcher, individually and as administrator of the Estate of Rya E. Bratcher, deceased; William Cochran; Robert R. Day; Raymond E. Deitz; Wilha C. Dietrich; William J. Dugan, administrator of the Estate of Merle Dugan, deceased; Dewey Durbin; Joseph I. Finfrock; William L. Gray; Phyllis Gruber, individually and as administrator of the Estate of Charles W. Gruber, deceased; John V. Handley; Margaret Harmon, individually and as administrator of the Estate of Thomas R. Harmon, deceased; Lee E. Hayes; Jerry D. Heck; Walter W. Lehr; Jarvis Long; Retha McCandless, individually and as administrator of the Estate of Uvell P. McCandless, deceased; Michael J. McGuire; Geneva Eileen Mau, individually and as administrator of the Estate of William R. Mau, Sr., deceased; Juan Mendiola; Patty J. Miller, individually and as administrator of the Estate of James H. Miller, deceased; Donald P. Murphy; Gladys Nevious, individually and as administrator of the Estate of Ernest L. Nevious, deceased; Ben W. Paul; Robert Poe; Clyde E. Price; Betty J. Redman, individually and as administrator of the Estate of George Redman, deceased; Neal R. Ring, individually and as administrator of the Estate of Molly Ring, deceased; Gerald Ringo, individually and as administrator of the Estate of Tracy E. Ringo, deceased, Jerry Sampson, individually and as administrator of the Estate of Raymond H. Sampson, deceased; Joyce Schultz, individually and as administrator of the Estate of Calvin P. Schultz, deceased; Chlora Skinner, individually and as administrator of the Estate of Robert D. Skinner, deceased; Mary I. Smith, individually and as administrator of the Estate of Wesley H. Smith, deceased; John Spicer; Delora Stewart, individually

and as administrator of the Estate of William P. Stewart, deceased; Vernadine T. Thacker, individually and as administrator of the Estate of Charles A. Thacker, deceased; Lois J. Thacker, individually and as administrator of the Estate of Leslie D. Thacker, deceased; Evelyn Tynan, individually and as administrator of the Estate of William P. Tynan, deceased; Robert Van Dorn; John H. Wehmeier; William Wilder; Peoples Bank of Bloomington, administrator of the Estate of Walter Winkelmann, deceased; and Anna Wojtczak, individually and as administrator of the Estate of Eugen Wojtczak, deceased.

Respondents Are:

(1) Debtor: UNR INDUSTRIES, INC., UNARCO INDUSTRIES, INC., UNR INC., UNR-ROHN, INC. (Alabama), UNR-ROHN, INC. (Indiana), JOBAL TUBE CO., INC., and FOLDING CARRIER CORP, and

(2) TRUSTEES OF THE UNR ASBESTOS DISEASE CLAIMS TRUST.

III. TABLE OF CONTENTS

I. QUESTIONS PRESENTED i

II. PARTIES ii

III. TABLE OF CONTENTS iv

IV. TABLE OF AUTHORITIES vi

V. OPINIONS DELIVERED IN THIS PROCEEDING BY OTHER COURTS ix

VI. STATEMENT OF JURISDICTION ix

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED x

VIII. STATEMENT OF THE CASE 1

A. Description of Parties 1

B. Basis for Federal Appeals Jurisdiction 1

1. District Court Jurisdiction 1

2. Court of Appeals Jurisdiction 2

C. Facts 2

IX. REASONS IN SUPPORT OF ALLOWING THE WRIT OF CERTIORARI 7

A. The Seventh Circuit's Refusal To Consider Workers' Appeals Violates Separation of Powers Principles 9

1. Abstention From Workers' Appeals On The Basis That Reorganization Plans Should Not Be Disturbed Absent a "Powerful Reason" Substitutes the Court's Judgment for Congress' 9

2. The Court Had A Duty To Decide Workers' Appeals Once It Determined It Could Provide The Relief Requested 14

B. The Inclusion of "Future Claimants" In UNR's Reorganization Exceeds The Judicial Power Granted In Article III of the Constitution and the Bankruptcy Code 16

1. Workers, As Existing Creditors Whose Shares Will Be Diluted By Including Future Claimants, Have Standing To Contest Their Inclusion 16

2. Under Article III of the Constitution, There Is No Jurisdiction To Bind Future Claimants ... 17

3. The Seventh Circuit's Holding That Future Claims May Be Included in the Bankruptcy Code's Definition of "Claim" Conflicts With Other Circuits 24

X. Conclusion 25

IV. TABLE OF AUTHORITIES

Cases

Allen v. Wright, 468 U.S. 737 (1984) 11

American Motorists Insurance Company v. United Furnace Co., 876 F.2d 293 (2d Cir. 1989) 17

Boston & Maine Corp. v. Chicago Pacific Corp., 785 F.2d 562 (7th Cir. 1986) 23

City of Los Angeles v. Lyons, 461 U.S. 95 (1983) 8, 19, 20

City of Milwaukee v. Illinois, 451 U.S. 304 (1981) 14

Diamond v. Charles, 476 U.S. 54 (1986) 20

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 18, 19

England v. Medical Examiners, 375 U.S. 411 (1963) 15

Gilmore v. Utah, 429 US 1012 (1976) 21

Hanson v. Denckla, 357 U.S. 235, 245 (1958) 17

In re Chateaugay Corporation, 944 F.2d 997 (2d Cir. 1991) 24

In re Iowa R.R., 840 F.2d 535 (7th Cir. 1988) 23

In re Mooney Aircraft, 730 F.2d 367, 375 (5th Cir. 1984) . 24

Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting, 908 F.2d 1351 (7th Cir. 1990) 13

Lemelle v. Universal Mfg. Corp., 18 F.3d 1268 (5th Cir. 1994) 25

Minority Pol. Off. Ass'n v. City of South Bend, Ind., 721, F.2d 197 (7th Cir. 1983) 17

New Orleans Public Service, Inc. v. Council of New Orleans, 491 U.S. 350 (1989) 8, 15

Phillips Petroleum Co. v. Shutts et al, 472 U.S. 797, 805-806 17

Poe v. Ullman, 367 U.S. 497 (1961) 11

Reading Co. v. Schweitzer, 474 U.S. 864 (1985) 24

Remington Rand Corp., 836 F.2d 825, 832, note 7 at 833, (3rd Cir. 1988) 24

Schuppin v. Unification Church 435 F. Supp. 603 (D. Vt.), *aff'd* 573 F2d 1295 (2d Cir. 1977) 21

Schweitzer v. Consolidated Rail Corp., 758 F.2d 936 (3rd. Cir.), *cert. denied sub nom., Reading Co. v. Schweitzer,* 474 U.S. 864 (1985) 24

Sierra Club v. Morton, 405 U.S. 727 (1972) 20

Singleton v. Wulff, 428 U.S. 106 (1976) 18

Warth v. Seldin, 422 U.S. 490, 508 (1975) 21

Whitmore v. Arkansas, 495 U.S. 149 (1990) 8, 19, 20

Willcox v. Consolidated Gas Co., 212 U.S. 19, 40 15

Wyoming v. Oklahoma, 117 L. Ed. 2d 1 (1992) 15

Statutes and Rules

11 U.S.C. § 101(5) 10, 24, 25

11 U.S.C. § 105(a) 4

11 U.S.C. § 1127(b) 5

11 U.S.C. § 1129 ..... 13, 14

11 U.S.C. § 1129(a)(7)(A)(ii) 4, 9

11 U.S.C. § 363 13

11 U.S.C. § 363(m) 8, 13, 14

11 U.S.C. § 524 14

28 U.S.C. § 158(a) 1

28 U.S.C. § 158(d) 2

28 U.S.C. § 1291 2

Treatises

Bickel, Alexander M., "The Least Dangerous Branch," 2d ed., Yale University Press, (1986) 11, 15

Brilmayer, Lea, "The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement", 93 Harvard Law Rev. 297, No. 2 (1979) 21

Cowans Bankruptcy Law and Practice, 6th ed. (1994) . 13

Field, Martha A. "The Uncertain Nature of Federal Jurisdiction", 22 William and Mary Law Review 683 (1981) 16

Floyd, C. Douglas, "The Justiciability Decisions of the Burger Court", 60 Notre Dame Law Review 862 (1985) 19

Jackson, Thomas H., *The Logic and Limits of Bankruptcy Law* (1986) 24

Redish, Martin H., "Abstention, Separation of Powers, and the Limits of the Judicial Function", 94 Yale Law Journal 71 (1984) 12

Roe, Mark J., *Bankruptcy and Mass Tort,* 84 Colum. L. Rev. 846 (1984) 24

Seidman, Selikoff & Hammond, "Short-term Asbestos Work Exposure and Long-term Observation," *Health Hazard of Asbestos Exposure,* 330 Annals N.Y. Acad. Sci. 31 (1979) 21

Selikoff, Churg & Hammond, *Asbestos Exposure and Neoplasia,* 188 J.A.M.A. 22 (1964) 21

Shapiro, David L., "Jurisdiction and Discretion", 60 N.Y.U.L. Rev. 543 (1985) 12, 15

Waton, Corey C., Comment, "Mootness and the Constitution", 86 NW U.L. Rev. 143 (1991) 11, 16

United States Constitution

Article III 4, 5, 8, 9, 11, 14, 17, 19, 20, 21, 23, 24

V. OPINIONS DELIVERED IN THIS PROCEEDING BY OTHER COURTS

A. *In the Matter of: UNR Industries, Inc., et al., Debtors. Appeals of: Unarco Bloomington Factory Workers*, 1994 U.S. App. LEXIS 12519 (Rehearing Denied); Exhibit A to Petitioners' Appendix ("Workers' App.")

B. *In the Matter of: UNR Industries, Inc., et al., Debtors.*, 20 F.3d 766 (7th Cir. 1994); Workers' App. at C

C. *In re UNR Industries*, 725 F.2d 1111 (7th Cir. 1984); Workers' App. at D

D. *In re UNR Industries*, 165 B.R. 198 (N.D.Ill. 1993); Workers' App. at F

E. *Unarco Bloomington Factory Workers v. UNR Industries, Inc.*, No. 89 C 5220 (N.D.Ill. 1992); Workers' App. at N

F. *Unarco Bloomington Factory Workers v. UNR Industries*, 124 B.R. 268 (N.D.Ill. 1990); Workers' App. at G

G. *In re: UNR Industries*, 29 B.R. 741 (N.D.Ill. 1983); Workers' App. at H

H. *In re UNR Industries*, 143 B.R. 506 (Bkrtcy N.D.Ill. 1992).

I. *In re UNR Industries*, 46 B.R. 671 (Bkrtcy N.D. Ill. 1985); Workers' App. at I

VI. STATEMENT OF JURISDICTION

The judgment of the Seventh Circuit Court of Appeals was entered on April 5, 1994. The judgment was final in that it affirmed the result, but not the reasoning, of the district court's dismissal of Workers' appeals from UNR's Plan of reorganization, the injunction supplementing the Plan, and the Asbestos

Disease Trust. The Seventh Circuit's decision was final and terminated Workers' appeals. *In the Matter of: UNR Industries, Inc., et al., Debtors.*, 20 F.3d 766 (7th Cir. 1994). Workers filed a petition for rehearing which was denied on May 27, 1994. *In the Matter of: UNR Industries, Inc., et al., Debtors. Appeals of : Unarco Bloomington Factory Workers*, 1994 U.S. App. LEXIS 12519 (Order, Rehearing Denied). Workers seek review of this decision by writ of certiorari pursuant to 28 U.S.C. § 1254.

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(Full Text Located at Exhibit O, Workers' Appendix)

A. United States Constitution

1. Article I, §§ 1 and 8
2. Article III, §§ 1 and 2

B. United States Code

1. 28 U.S.C. § 1254
2. 28 U.S.C. § 1291
3. 28 U.S.C. § 1331
4. 28 U.S.C. § 1334
5. 28 U.S.C. § 158
6. 11 U.S.C. § 101(5)
7. 11 U.S.C. § 105
8. 11 U.S.C. § 363(m)
9. 11 U.S.C. § 1129

VIII. STATEMENT OF THE CASE

A. Description of Parties

Petitioners are individually named on page ii herein, and hereinafter will be referred to collectively as "Workers". Workers are creditors of Chapter 11 Debtor UNR Industries, its predecessors and related entities. Workers' claims result from employee exposure to asbestos at UNARCO's Bloomington, Illinois plant, which manufactured asbestos products from the early 1950's through 1970. All 48 Workers were diagnosed as contracting asbestos disease prior to the time Debtors filed their Chapter 11 petitions in 1982.

The Respondents are (1) UNR Industries and its subsidiaries, including UNARCO Industries, (collectively referred to as "UNR"), which filed for Chapter 11 bankruptcy relief on or about July 29, 1982, and (2) the Trustees of the UNR Asbestos Disease Trust.

B. Basis for Federal Appeals Jurisdiction

1. District Court Jurisdiction

UNR filed a voluntary petition under Chapter 11 of the United States Bankruptcy Code on July 29, 1982. On June 1 and 2, 1989 the Bankruptcy Court entered a final order confirming UNR's Plan of reorganization, a permanent injunction as a condition precedent of the Plan, and UNR's Asbestos-Disease Claims Trust, By Laws and Claims Resolution Procedures ("Trust"). On July 9, 1989, Workers appealed these orders to the district court, pursuant to 28 U.S.C. § 158(a). On or about December 6, 1990, the district court entered certain findings, but remanded the issue of classification of Workers' claims against UNR to the bankruptcy court, prior to issuance of a final ruling on appeal. *Unarco Bloomington Factory Workers vs. UNR et al*, 124 B.R. 268 (N.D.Ill. 1990).

On July 28, 1992, the bankruptcy court determined Workers' classification. *In re UNR Industries, Inc.*, 143 B.R. 506 (Bkrtcy.

N.D.Ill. 1992). Based on the bankruptcy court's findings on remand, the district court dismissed Workers' confirmation appeal for lack of standing. Judgment of dismissal was entered on December 23, 1992 and docketed December 29, 1992. Also, on April 19, 1993, the district court dismissed Workers' appeal from the Amended UNR Asbestos Disease Trust as moot.

2. Court of Appeals Jurisdiction

The judgment entered on December 29, 1992 was a final order dismissing Workers' appeal on grounds including mootness and standing. By order of the district court, Workers were given to and including February 26, 1993 to file their appeal to the Court of Appeals, which was filed on February 26, 1993. That appeal was assigned 93-1510. Workers also appealed the April 19, 1993 judgment dismissing the Trust appeal on May 18, 1993. That appeal was assigned 93-2268. On May 28, 1993, the Court of Appeals entered an order consolidating 93-1510 and 93-2268 for purposes of briefing and disposition. The Court of Appeals had jurisdiction to review the district court's judgment dismissing Workers' appeals pursuant to 28 U.S.C. § 158(d) and 28 U.S.C. § 1291, as the appeals were from final judgments regarding federal questions of bankruptcy law.

C. Facts

The principal reason for UNR's bankruptcy was the increasing exposure to asbestos product liability suits filed against the company. *In re UNR Industries*, 143 B.R. 506, 518-519 (Bkrtcy. N.D.Ill. 1992). Shortly after its bankruptcy filing, on October 12, 1982, UNR initiated a campaign to include, bind and discharge "Unknown Putative Asbestos-Related Claimants" in its bankruptcy proceeding by filing a motion to appoint a legal representative for them. *Matter of UNR Industries, Inc.*, 725 F.2d 1111, 1113 (7th Cir. 1984). Withdrawing the reference from the bankruptcy court, the district court denied UNR's application on the basis that unknown future asbestos claimants did not hold

"claims" as defined in § 101(5) of the Bankruptcy Code and were not entitled to protection. *In re UNR Industries, Inc.*, 29 B.R. 741 (N.D. Ill. 1983), Workers' App. at H. UNR appealed that ruling, which was dismissed for lack of finality. *In re UNR Industries, Inc.* 725 F.2d 1111 (7th Cir. 1984), Workers' App. at D.

However, in dicta, the Court of Appeals suggested that regardless of whether future claims could ultimately be provided for in UNR's bankruptcy, the district court might reconsider an appointment of a legal representative to advocate their interests if one or more future claimants came forward and filed a claim. *Id.* at 1120. Although no future claimant came forward and requested the appointment of a legal representative, UNR renewed its request to the district court, who referred the matter to the bankruptcy court. *In re UNR Industries, Inc*, 46 B.R. 671, 673 (Bkrtcy. 1985), Workers' App. at I. UNR's Creditors' Committee also renewed their objection to the appointment, arguing that future tort victims could not be creditors of UNR's estate, and that the court should exercise judicial restraint and leave the problem of mass toxic tort disasters to the legislature. *Id.* at 674, 675. Without specifically deciding whether future claimants were creditors of UNR's estate, entitled to share in its assets, or the extent of its judicial power to include or bind such claimants, the bankruptcy court nevertheless decided that future tort victims were at least parties in interest, and entitled to be heard. Accordingly, a legal representative was appointed for them in February 1985. *Id.* at 676.

The appointment of the legal representative boosted UNR's campaign to discharge unknown, and unaccrued hypothetical claims of future victims of asbestos in its current bankruptcy. Under its Plan of reorganization confirmed in 1989, UNR's trade creditors and stockholders received approximately 37% of the reorganized debtor's ("New UNR") stock for claims held prior to UNR's bankruptcy. Prepetition UNR stockholders retained about eight percent of the debtor plus received warrants to pur-

chase more shares at a price fixed slightly higher than the market for the stock prior to confirmation of UNR's Plan. *Unarco Bloomington Factory v. UNR Industries*, 124 B.R. 268, 271 (N.D.Ill. 1990). Most victims of asbestos disease were placed into "Class 5" of claims under the Plan. The Plan's definition of this class includes asbestos victims who may have been exposed to UNR's asbestos products before the bankruptcy, before confirmation, *or after confirmation*, but do not know they have an injury or do not yet even have an injury ("Future Claimants"). *Id*. Under the Plan, Class 5 asbestos creditors did not receive stock directly from New UNR. Instead, 63% of the shares of New UNR was distributed to an Asbestos Disease Trust, which was established to pay a portion of existing and Future Claims from asbestos related injuries. *Matter of UNR Industries, Inc.*, 20 F.3d at 788. As an essential condition to the Plan, the bankruptcy court also entered an Injunction which purported to bind Future Claimants by enjoining them from suing New UNR, and limiting satisfaction of their claims to the Trust. *See*, Order of Injunction entered in June of 1989, Workers' App. at K.

Workers objected to UNR's Plan, the Injunction and the Trust. Principally, Workers argued that the bankruptcy court did not have the power under Article III of the Constitution to enjoin Future Claimants or otherwise bind these unknown, hypothetical individuals to UNR's Plan. Moreover, even if the bankruptcy court had such jurisdiction, the Plan could not be confirmed under 11 U.S.C. § 1129(a)(7)(A)(ii), because the inclusion of Future Claims would dilute Workers' share of UNR's assets, and provide Workers less in UNR's Chapter 11 than in Chapter 7, where only existing claims would be paid by a Trustee. Finding that Future Claimants are ". . . claimants within the meaning of the Bankruptcy Code . . ." and that Article III jurisdiction existed by virtue of § 105[1] of the Bankruptcy Code, the bankruptcy court

[1]U.S.C. § 105(a) states in relevant part: The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

orally overruled Workers' objections. Transcript of Confirmation Proceedings, June 1, 1989, pp. 127-128, Workers' App. at L.

Workers appealed the Plan, Trust and Injunction Orders. Workers sought a stay pending these appeals ". . . at every opportunity . . .", including pressing emergency appeals from the bankruptcy court's denial of a stay to the district court and the Court of Appeals. 20 F.3d at 768-769. The primary reason for denying Workers their stay was that shortly after confirmation of its Plan, UNR issued stock warrants to its prepetition shareholders and the warrants began trading on a public exchange. The district court was concerned about stock trades done in reliance of the approval of UNR's Plan. *See*, excerpts from Transcript of Proceedings on Workers' motion for stay pending appeals, July 11, 1989, Workers' App. at M.

After Workers appealed these orders to the district court, the Trust Order was amended by the bankruptcy court, upon motion of the Trustees, in March of 1990. Workers objected to the amendment arguing *inter alia* that such an attempt to amend the Trust nearly a year after confirmation of the Plan violated 11 U.S.C. § 1127(b), which dramatically restricts modifications of Plans following confirmation and consummation. The bankruptcy court rejected Workers' objections, holding that the Trust was not part of UNR's Plan. Workers appealed that order to the district court which was then consolidated with the Workers' two appeals relating to the Plan and Injunction. *Unarco Bloomington Factory v. UNR Industries*, 124 B.R. 268, 272 (D.C.Ill. 1990), Workers' App. at G.

The district court, again preoccupied with the trading of shareholder warrants and stock of New UNR in reliance on the Plan, dismissed most of Workers' Plan appeal as moot. *Id* at 281. Concluding that Workers' Article III "case or controversy" objection related to the Plan as opposed to the Injunction, the district court did not decide the issue because the Plan appeal was moot and Workers lacked standing to raise the jurisdictional issue. *Id*. at

273-274. As to most of Workers' remaining appeals, the court raised *sua sponte* the issue of whether Workers had standing to appeal the Plan and Trust, because Workers maintained they held Workmen's Compensation Claims, which, under the Plan, were entitled to full payment. UNR denied Workers were entitled to full payment, but the issue was not yet resolved by the bankruptcy court. The district court, on its own, and not at the request of Workers, as suggested in the Court of Appeals' decision (20 F.3d at 768), remanded the rest of Workers' appeals to determine classification of Workers' claims. The district court indicated that if Workers held Class 2 workmen's compensation claims, they might not possess standing to appeal the Plan or Trust, because the Plan promised to pay workmen's compensation claims in full. 268 B.R. at 282-283.

The bankruptcy court did not issue a decision on classification until over a year and a half following the remand. The bankruptcy court held that Workers possessed *both* Class 2 workmen's compensation claims and Class 5 asbestos claims. *In re UNR Industries, Inc.*, 143 B.R. 506 (Bkrtcy.N.D.Ill. 1992). UNR then moved to dismiss Workers' appeals before the district court on grounds of standing, raising the district court's previous *sua sponte* observation that full payment of the workmen's compensation claims eliminated any injury to Workers from implementation of the Plan or Trust. Over Workers' objections,[2] the district court dismissed Workers' remaining appeal of UNR's Plan for lack of standing. *Unarco Bloomington Factory Workers v. UNR Industries, Inc.*, No. 89 C 5220 (N.D. Ill. Dec. 10, 1992), Work-

[2]Workers' Class 2 workers' compensation claims were subject to statutory caps and other limitations which did not exist in connection with Workers' Class 5 asbestos disease claims. Consequently, full payment of a workers' compensation claim would not necessarily be full payment of the Class 5 claim, which was an ordinary tort claim, not subject to limits imposed by the workers' compensation laws. Workers argued that the bankruptcy court's determination that they held Class 5 claims, in addition to Class 2, preserved their standing to appeal treatment of Class 5 claimants under UNR's Plan.

ers' App. at N. Additionally, reversing its previous decision in 1990 that the Workers' Trust appeal was not moot, the district court decided that the passage of time and Workers' failure to repeat requests for a stay of the Trust, after already having been denied a stay, mooted Workers' Trust appeal. *Unarco Bloomington Factory Workers v. UNR Industries, Inc. et al*, 165 B.R. 198 (D.C.Ill. 1993), Workers' App. at F.

Workers then appealed the district court's decisions on the Plan, Injunction, and Trust to the Seventh Circuit Court of Appeals. The appeals were consolidated for briefing purposes. On April 5, 1994, Judge Easterbrook issued the opinion for the court, disagreeing with the district court that Workers' appeals were moot, since the relief sought, i.e., excluding Future Claimants from trust assets, could still be granted. *Matter of: UNR Industries, Inc., et al*, 20 F.3d 766, 768,771 (7th Cir. 1994), Workers' App. at C. However, because of the Court's belief that activated plans should assume virtually a "holder in due course" status, subject to review for a "powerful reason" only, it declined to review the merits of Workers' three appeals. The Court of Appeals did not consider the question of the bankruptcy court's power to bind Future Claimants sufficiently important or novel to trigger review. *Id*. at 770-771.

IX. REASONS IN SUPPORT OF ALLOWING THE WRIT OF CERTIORARI

The Seventh Circuit's abstention decision was based on its view that while Workers' appeals were *not* moot, a "powerful reason" must exist to invoke review of a Chapter 11 plan once it is activated. Congress did not legislate any such limitation to the right to appeal from confirmation of a bankruptcy plan, although it

expressly limited the right to appeal other types of bankruptcy transactions,[3] and thus could have done so if considered wise. The Seventh Circuit's judicially created barrier to Congress' intent to afford an appeal, on unarticulated "prudential" grounds, violates the separation of powers mandated in the United States Constitution, both because the Seventh Circuit has legislated a new provision to the Bankruptcy Code, and because it refused to exert its jurisdiction, despite an "unflagging" obligation to do so. *New Orleans Public Service, Inc. v. Council of New Orleans*, 491 U.S. 350, 358-359 (1989).

Conversely, the Seventh Circuit's endorsement of a bankruptcy court's power to enjoin unidentified, unknown future tort claimants, and bind them to a Plan negotiated with existing creditors, exceeds the bounds of jurisdiction granted under Article III of the United States Constitution. *Los Angeles v. Lyons*, 461 U.S. 95, 101-104, 111 (1983); *Whitmore v. Arkansas*, 495 U.S. 149, 157-159 (1990).

This simultaneous extension of jurisdiction beyond that clearly indicated in the Constitution, coupled with the failure to exercise the court's established power to hear Workers' appeals, turns the law of judicial restraint inside out. The result of UNR's attempts to deal with threatened future harm should have been the opposite of what the Seventh Circuit approved in this case. UNR's effort to dispose of future injuries was not a matter for the courts, but for the legislature. On the other hand, Workers' appeals relating to the proper construction of the bankruptcy laws was a matter for the court. And despite the difficult questions raised in those appeals, the Seventh Circuit's job was to decide them—not duck them.

---

[3] 11 U.S.C. § 363(m) provides that failure to obtain a stay of an order approving the sale of assets, authorized pursuant to § 363, moots an appeal of the sale order after the sale closes.

A. The Seventh Circuit's Refusal To Consider Workers' Appeals Violates Separation of Powers Principles

1. Abstention From Workers' Appeals On The Basis That Reorganization Plans Should Not Be Disturbed Absent a "Powerful Reason" Substitutes the Court's Judgment for Congress'

Workers' principal objection to UNR's reorganization Plan was that the inclusion of Future Claimants in the Asbestos Disease Trust diluted the amount existing asbestos disease creditors, like Workers, would receive. Under this scenario, Workers would be better off if UNR were sold or liquidated in a Chapter 7 instead of reorganized under its Chapter 11 plan, since assets in the Chapter 7 would be distributed to creditors with allowed claims only. Because Future Claims are included to dilute Workers' share, UNR's Plan flunks the "best interests" test in 11 U.S.C. § 1129(a)(7)(A)(ii).[4] Workers sought the exclusion of Future Claimants from UNR's reorganization on the basis that the bankruptcy court had no power to adjudicate or bind them, and even if the power did exist under Article III of the Constitution, their hypothetical and necessarily estimated claims could not be in-

[4]Under UNR's Plan only asbestos disease creditors have had their claims significantly diluted by the inclusion of future asbestos disease claims. The Asbestos Disease Trust is required to limit current payouts to account for all future claims which may ever be made. At present, the Trustees have decided that this permits a payout of only 17 cents on the dollar to existing asbestos creditors, in installments. In contrast, neither UNR's trade creditors or shareholders' claims were significantly diluted. They received stock immediately and directly, and their payouts were not deferred until the Trustees figured out how to estimate the number of future claims. As counsel for UNR noted during oral argument before the Court of Appeals, given the dividends that were issued following UNR's confirmation, the trade creditors and old stockholders of UNR ultimately received nearly 100 cents of their claims against UNR. This tragedy of quickly cashing out those who voluntarily profited from UNR's business at 100 cents, versus the 17 cents for those tort victims involuntarily injured by UNR's enterprises, hardly is the "notable success" that Judge Easterbrook believes. 20 F.3d at 768.

cluded because of the Bankruptcy Code's definition of "claim" in 11 U.S.C. § 101(5).

Although Workers sought a stay pending their appeals at "every opportunity"[5], the stays were denied. Despite knowledge of Workers' appeals, UNR raced to implement its Plan and the Asbestos Disease Trust was established. The district court's decision to remand Workers' appeals to resolve a questionable issue of standing, raised *sua sponte*, delayed Workers' appeals for nearly two years. *See*, p. 6, herein. Nevertheless, the Seventh Circuit disagreed with the district court that Workers' appeals were moot. 20 F.3d at 771, 768. It decided that relief could be granted by holding that Future Claimants could not share in the Trust's assets. *Id.* at 768. However, even though the court admitted it had jurisdiction to review the appeals and grant Workers' relief, it abstained for "prudential" reasons:

> There is a big difference between the *inability* to alter the outcome (real mootness) and *unwillingness* to alter the outcome ("equitable mootness"). Using one word for two different concepts breeds confusion. Accordingly, we banish "equitable mootness" from the (local) lexicon. We ask not whether this case is moot, "equitably" or otherwise, but whether it is prudent to upset the plan or reorganization at this late date.
>
> Far stronger is the contention that reliance on the plan of reorganization makes it imprudent to revise things. Since the Plan went into effect, more than 15 million shares of New UNR have been distributed to its creditors and pre-petition shareholders and are trading on public exchanges. Warrants for additional stock have been issued and are trading.
>
> *Id.* at 768-769.
>
> Every incremental risk of revision on appeal puts a cloud over the plan of reorganization, and derivatively over the assets of the reorganized firm. People pay less for assets that may be snatched back or otherwise affected by subsequent

[5]20 F.3d 766, 769 (7th Cir. 1994).

> events . . . Many common law doctrines, such as the rule that a holder in due course takes free of certain defects in its predecessor's rights, reflect the importance of this effect. We do likewise in preserving plans of reorganization unless a powerful reason demands alteration.
>
> *Id.* at 770.

While there is precedent justifying judicial restraint for "prudential" as opposed to constitutional and jurisdictional reasons, the Seventh Circuit's abstention is not out of concern for effective presentation of issues, concreteness, adversity, conservation of court resources or other historically approved "prudential" reasons.[6] Instead, the Seventh Circuit's abstention results from its own belief that activated plans of publicly held companies should enjoy a presumption against appellate review. While Congress could conceivably decide that the interests of speculators in an insolvent company's stock are paramount to those who suffer injury as a result of the company's enterprise, it is inconceivable that an unelected judiciary could make this decision.

Indeed, the very justification argued for some "prudential" discretion to decline review is rooted in the Constitution's separation of powers principle, i.e., courts should shun issues that the legislature is better equipped to resolve. *Allen v. Wright*, 468 U.S. 737, 750-752 (1984), quoting *Vander Jagt v. O'Neill*, 699 F.2d 1166, 1178-1179 (1983) (Bork, J., concurring):

> All of the doctrines that cluster about Article III—not only standing but mootness, ripeness, political question, and the like—relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government.

See, also *Poe v. Ullman*, 367 U.S. 497, 503 (1961); Bickel, Alexander M., "The Least Dangerous Branch," 2d ed., Yale Univer-

[6]Waton, Corey C., Comment, "Mootness and the Constitution", 86 NW U.L. Rev. 143, 160, n. 138 (1991).

sity Press, (1986) at 70; Shapiro, David L., "Jurisdiction and Discretion", 60 N.Y.U.L. Rev. 543, 574 (1985). But in this case, the Seventh Circuit used abstention to make legislative policy, instead of avoiding it. Abstention used in this fashion threatens the balance of power between the courts and the legislature:

> Judge-made abstention constitutes judicial lawmaking of the most sweeping nature. Although a federal court's decision to infer a private cause of action may arguably invade the legislative process, judge-made abstention presents a considerably greater risk of judicial usurpation. While judicial creation of private rights of action can undermine a carefully structured statutory goal only indirectly, judicial lawmaking through abstention can very directly undermine that goal.
>
> Recognition that abstention amounts to judicial lawmaking shifts the focus of the abstention debate away from the comparative merits of the policies for and against the various forms of abstention and toward the issue of the institutional legitimacy of such action on the part of the judiciary. Well accepted principles of separation of powers mandate that an electorally accountable legislature make the basic policy decisions concerning how the nation is to be governed. The authority to make these policy decisions necessarily includes the authority to employ the federal judiciary to enforce the substantive statutory programs adopted by Congress. Absent a finding of unconstitutionality, it is not the judiciary's function to modify or repeal a congressional enforcement network unless Congress has clearly delegated such authority to the judiciary. No court or commentator has presented persuasive evidence of any congressional intent to delegate such authority. Indeed, throughout the nation's history, Congress has retained for itself the authority to decide when federal courts should decline to exercise their jurisdiction.
>
> Redish, Martin H., "Abstention, Separation of Powers, and the Limits of the Judicial Function", 94 Yale Law Journal 71, 114-155 (1984).

Workers possessed a right to appeal:

> Final orders are appealable as of right. 28 U.S.C.A. § 158(a) gives district courts jurisdiction of final orders,

> decisions etc. of the bankruptcy court and § 158(b) gives the bankruptcy appellate panels jurisdiction of such bankruptcy court orders. Courts of appeal for the circuits are given jurisdiction of final orders entered under those provisions.
>
> *Cowans Bankruptcy Law and Practice*, Vol. 3, § 18.2(i), p. 487 (1994). *See* also, 28 U.S.C. § 158(d).

Orders confirming plans and entering injunctions under § 105 of the Bankruptcy Code are final. *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351 (7th Cir. 1990); *Cowans Bankruptcy Claw and Practice*, Vol. 3, § 18.2(d), p. 475 (1994).

Congress placed no special limitation or test, such as the Seventh Circuit's "powerful reason" rule, on a creditor's right to appeal a reorganization in bankruptcy. In contrast, Congress did state in § 363(m) of the Bankruptcy Code, that a failure to obtain a stay of an order authorizing the sale or lease of an asset, *pursuant to § 363*, cannot affect the validity of the sale or lease unless a stay pending appeal was obtained. It is significant that the wording of § 363(m) expressly refers to sales under § 363 only, and there is no companion provision in § 1129 relating to confirmation of plans.

There is good reason for this. Sales or leases of an estate's assets do not have the vast potential for altering the rights of creditors as reorganization plans do. Indeed, if UNR's reorganization remains intact, § 1129 is "all powerful" and can even affect the rights of "Future Claimants" who do not yet have or realize they have a claim against UNR. As to § 363, Congress may have balanced the need for producing clear title with respect to the sale of an estate's asset against the rights of creditors, and determined that good title was paramount, absent a stay pending appeal. In contrast, the certainty regarding the value of a reorganized company's stock may not be paramount to the rights of creditors discharged pursuant to §§ 1129 and 524 of the Bankruptcy Code,

and Congress' failure to limit appeals from reorganizations, as opposed to asset sales or leases, was likely a deliberate act.

Nevertheless, the Seventh Circuit has determined that the policy behind § 363(m) should be transplanted to 1129, to enhance the value of the reorganized company's assets. 20 F.3d at 769-770. Its holding that it will refuse to adjudicate appeals from implemented plans, absent a "powerful reason", has no support in the Bankruptcy Code, or in the cases cited by the Seventh Circuit for the proposition that ". . . a plan of reorganization, once implemented, should be disturbed only for compelling reasons . . ." *Id.* at 769. All of the cases cited in support of that proposition deal strictly with the ability to grant relief to the appellant and whether or not the appeal is moot in an "Article III" sense. *Id.* In contrast to those cases, the Seventh Circuit has held that Workers' appeals are not moot, because relief can be granted. However, absent some "powerful reason", the issues of bankruptcy law raised by Workers are just "details", not deserving of review.[7] *Id.* at 771. The Seventh Circuit's "powerful reason" requirement is rank, judicial legislation that upsets the separation of powers mandated in our Constitution and should be reversed by this Court. *City of Milwaukee v. Illinois*, 451 U.S. 304, 313-314 (1981).

2. The Court Had A Duty To Decide Workers' Appeals Once It Determined It Could Provide The Relief Requested

Given a reorganization plan's ability to drastically cut off rights of creditors, the courts of appeals have a duty to consider the merits of a creditor's appeal, absent a limitation expressly placed in the Bankruptcy Code, or mandated under Article III of the

[7]The Seventh Circuit's opinion does not even discuss Workers' Injunction and Trust appeals. It is impossible to reconcile this with UNR's assertion in response to Workers' Petition for Rehearing that the Seventh Circuit really decided the appeals in contrast to abstention.

Constitution. As Justice Scalia recently expressed in *New Orleans Public Service v. Council of New Orleans*, 491 U.S. 350 (1989) at 358-359:

> Our cases have long supported the proposition that federal courts lack the authority to abstain from the exercise of jurisdiction that has been conferred . . . Underlying these assertions is the undisputed constitutional principle that Congress, and not the Judiciary, defines the scope of federal jurisdiction within constitutionally permissible bounds. *Kline v. Burke Construction Co.*, 260 U.S. 226, 234 (1922) . . . We have carefully defined, however, the areas in which such "abstention" is permissible, and it remains " 'the exception, not the rule.' " *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 236 (1984), quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 813 (1976). As recently as last Term we described the federal courts' obligation to adjudicate claims within their jurisdiction as " 'virtually unflagging.' " *Deakins v. Monaghan*, 484 U.S. 193, 203 (1988).

See also, *England v. Medical Examiners*, 375 U.S. 411 (1963) at 415: "When a Federal court is properly appealed to in a case over which it has by law jurisdiction, it is its duty to take such jurisdiction . . ." (Quoting *Willcox v. Consolidated Gas Co.*, 212 U.S. 19, 40.) Even ardent advocates of this Court's power to use discretion to decline jurisdiction recognize the obligation and duty of lower federal courts to accept it. *Wyoming v. Oklahoma*, 117 L. Ed. 2d 1, 36 (1992) (Thomas, J., dissenting, noting that lower federal courts are available to consider issues the Supreme Court declines); *See*, Bickel, Alexander M., "The Least Dangerous Branch", 2d ed., Yale University Press, (1986) at 173: "They must, indeed, resolve all controversies within their jurisdiction, because the alternative is chaos."

Moreover, one commentator, who does champion broad discretion to abstain for the lower courts, at least recognizes that discretion must be rooted in a historical or common law tradition. Shapiro, David L., "Jurisdiction and Discretion", 60 N.Y.U.L.

Rev. 543, 575 (1985). Otherwise, "A judicial power limited only by a judge's imagination is too offensive to the constitutional principles of limited power, separated powers, and even federalism to merit further consideration." Waton, Corey C., Comment, "Mootness and the Constitution" 86 NW U.L. Rev. 143, 166, n.166 (1991).

If this Court permits the Seventh Circuit to function as a "mini Supreme Court", effectively reviewing only those questions of law it chooses, more lower courts may employ similar discretion as an "escape hatch" from difficult questions.[8] Congress should make the rules and the federal courts should construe them. Here the Seventh Circuit abdicates its responsibility to decide Workers' appeals, and exceeds its authority in erecting judicially legislated barriers to those appeals.

B. The Inclusion of "Future Claimants" In UNR's Reorganization Exceeds The Judicial Power Granted In Article III of the Constitution and the Bankruptcy Code

1. Workers, As Existing Creditors Whose Shares Will Be Diluted By Including Future Claimants, Have Standing To Contest Their Inclusion

The bankruptcy court found that without the Injunction against Future Claimants, as well as existing creditors, UNR could not conduct its business or reorganize under Chapter 11.

[8]Field, Martha A. "The Uncertain Nature of Federal Jurisdiction", 22 William and Mary Law Review 683 (1981) at 724:

> . . . the flexibility the jurisdictional rules provide in their undeveloped state can prove useful to judges, allowing them to dispose of difficult cases without having directly to discuss the moral, social or political value judgments behind those dispositions. Some of the results judges have reached by following this approach seem, however, singularly inappropriate. For example, many of our discretionary doctrines allowing nonexercise of jurisdiction in cases falling within congressional grants apply primarily, or even exclusively, in civil liberties cases. . . .
>
> Perhaps one reason these rules have nonetheless developed here is that many difficult cases are involved, so it is an area in which courts look for escape devices.

Injunction Order, June 1, 1989, ¶ 5 Workers' App. at K-3. Significantly, the bankruptcy court determined that "Absent a successful reorganization, Debtors' assets would be liquidated and distributed only to *existing creditors* pursuant to Chapter 7 of the Bankruptcy Code." *Id.*, ¶ 7, (emphasis added). Based on the bankruptcy court's findings in the Injunction Order, the issue of whether Workers must share assets with Future Claimants hinges directly on the entry of the Injunction. Absent the Injunction barring Future Claimant lawsuits, Workers do not have to share assets with Future Creditors.

Both *Hanson v. Denckla*, 357 U.S. 235, 245 (1958) and *Phillips Petroleum Co. v. Shutts et al*, 472 U.S. 797, 805-806 (1985) held that one party has standing to assert lack of jurisdiction over another party who is necessary for the resolution of the lawsuit. UNR maintains that the inclusion of Future Claimants in the Injunction is necessary to its reorganization. Inclusion reduces Workers' share of recovery from UNR. Workers may accordingly raise the issue of whether the bankruptcy court has jurisdiction of Future Claimants under both Article III of the Constitution and the Bankruptcy Code.

The courts are also independently obligated to examine their jurisdiction to bind Future Claimants. *Minority Pol. Off. Ass'n v. City of South Bend, Ind.*, 721 F.2d 197 (7th Cir. 1983) at 199: ". . . a federal court does not acquire subject matter jurisdiction by the consent of the parties . . . we have an independent obligation to police the constitutional and statutory limitations on our jurisdiction . . ." See also, *American Motorists Insurance Company v. United Furnace Co.*, 876 F.2d 293 (2d Cir. 1989) at 298: "We must remain alert at all times to questions of subject matter jurisdiction, with or without prompting by the parties."

2. Under Article III Of The Constitution, There Is No Jurisdiction To Bind Future Claimants

In discussing the "case and controversy" requirement of Article III of the Constitution, this Court observed: "Federal Courts

must hesitate before resolving a controversy, even one within their constitutional power to resolve, on the basis of the rights of third persons not parties to the litigation." *Singleton v. Wulff*, 428 U.S. 106 (1976) at 113.

In responding to Workers' point that there is no "case or controversy" jurisdiction to include Future Claimants within a reorganization, the Seventh Circuit stated that ". . . even if no one has yet been injured and the risk to any particular plaintiff is slight . . ." there is a case or controversy. 20 F.3d at 770. However, *Duke Power Co. V. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978) did not so hold. In *Duke*, a bare majority of this Court held that residents near a nuclear power plant had standing to challenge a statute's limitation on compensation for nuclear accidents, because the lower court determined that some environmental damage had already occurred, and not because there was a slight probability that a full blown melt down would happen in the future. 438 U.S. at 73-74; 82; 94-95. The *Duke* decision emphasized there is no "case or controversy" to affect the rights of persons not before the court, and actually supports Workers' position that there is no jurisdiction to include Future Claimants in UNR's bankruptcy. *Id.* at 80-81. *See*, also the concurrence of Justice Rehnquist at 101: "Where the prospect of effective relief against a defendant depends on the actions of a third party, no justiciable controversy exists against the defendant."

UNR insists that without the inclusion of third parties not before the court, i.e., Future Claimants, it cannot be given the relief it sought in bankruptcy—to be rid of their claims. Nevertheless, no matter how desirable for courts to engage in management of mass torts, there is no jurisdiction to do so. As Justice Stevens stated in his concurring opinion in *Duke*:

> We are not statesmen; we are judges. When it is necessary to resolve a constitutional issue in the adjudication of an actual

> case or controversy, it is our duty to do so. But whenever we are persuaded by reasons of expediency to engage in the business of giving legal advice, we chip away a part of the foundation of our independence and our strength.
>
> *Id.* at 103.

Moreover, *Duke Power* is considered an atypical decision, given this Court's familiar rules of ripeness, standing, and concrete injury, and was probably motivated by the Court's desire to reverse the lower court ruling that the nuclear accident statute was unconstitutional. *See*, Floyd, C. Douglas, "The Justiciability Decisions of the Burger Court", 60 Notre Dame Law Review 862, 901 (1985) and Page 927:

> The Court's approach in *Duke Power* was fundamentally in error. The only immediate injury was unrelated to any arguable claim of right by the plaintiffs. And their only arguable claim of right—application of the limitation of liability provision—was not ripe. The Court was motivated by its perception of the public interest in prompt resolution of the constitutionality of the limitation of liability provision. But a principled separation of powers view of justiciability would, at the very least, have required congressional recognition of the appropriateness of judicial review in order to proceed, such as that in *Buckley*. . . . The approach in *Duke Power* should therefore be rejected in favor of that reflected in *Buckley v. Valeo*.

Significantly, two of this Court's decisions following *Duke Power*, *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) and *Whitmore v. Arkansas*, 495 U.S. 149 (1990), both strongly reaffirm that future injuries are not concrete enough to support judicial intervention under Article III of the Constitution. In *Lyons*, plaintiff's actual injury from a "chokehold" by a police officer, and his allegations that (1) chokeholds were encouraged by the Los Angeles Police Department in routine arrests, (2) the chokeholds caused ten deaths, and (3), five more deaths had occurred since the filing of his complaint, did not support jurisdiction to enter an injunction compelling the police department to halt the policy.

Actual injury, coupled with the anticipation that more would result, was not sufficient under Article III of the Constitution. 461 U.S. at 101-103.

In *Whitmore,* a fellow prison mate argued that he should be allowed to appeal the conviction of Simmons, who had waived his right of appeal. Whitmore alleged injury to himself, as well as asserting "next friend" status regarding Simmons. This Court held that Article III standing requires a concrete, non-speculative injury. *Lyons* was reaffirmed by this Court. 495 U.S. at 158. Moreover, Whitmore's attempt to become a "next friend" or legal representative of Simmons still did not afford standing. For a representative to litigate the interests of another, that "friend" must have some "significant relationship with the real party in interest." *Id.* at 163-165. In this case, the Future Claimant's legal representative, Kevin Forde, had no connection; he was simply an attorney appointed by the United States Trustee's Office, whose charge was to divine the interests of these unidentified people. Under *Whitmore*, Mr. Forde had no standing to negotiate for or bind the Future Claimants to UNR's Plan, and the courts had no power to enter orders reflecting his decisions on their behalf.

The bankruptcy court's appointment of a "legal representative" for claims which do not yet exist against UNR did not create a case or controversy. A party must seek relief for himself and the court must have the potential to redress the injury. *Sierra Club v. Morton*, 405 U.S. 727 (1972). In *Diamond v. Charles*, 476 U.S. 54 (1986), a doctor was not allowed to represent the rights of an unborn fetus. In that case, certain provisions of an Illinois statute restricting abortion were held unenforceable. The State of Illinois did not appeal these rulings, so Diamond, a physician opposed to abortion, intervened to challenge the decisions in order to protect the rights of unborn fetuses. This Court denied intervention since no case or controversy existed. 476 U.S. at 61-62; 67. Under *Diamond*, a legal representative for nonexistent

claimants cannot eliminate the case or controversy requirement of the Constitution. Although the likelihood of an unborn child asserting its own rights is much less than a potential asbestos victim, this Court recognized the importance of enforcing the case or controversy doctrine.

The minimum constitutional mandate under Article III is that a party may only invoke federal jurisdiction when he has himself suffered a threatened or actual injury resulting from another's illegal act. *Warth v. Seldin*, 422 U.S. 490, 508 (1975). Additionally, representatives cannot assert the rights of others unless the damages claims are "common to the entire membership" and shared by all in "equal degree." 422 U.S. at 515. As the literature reflects, contact with asbestos can produce a variety of illnesses, some slight, some deadly. Selikoff, Churg & Hammond, *Asbestos Exposure and Neoplasia*, 188 J.A.M.A. 22 (1964); Seidman, Selikoff & Hammond, "Short-term Asbestos Work Exposure and Long-term Observation," *Health Hazard of Asbestos Exposure*, 330 Annals N.Y. Acad. Sci. 31 (1979).

The whole purpose of demanding a concrete injury is to make certain that judicial effort is not wasted on a hypothetical situation that may not even bind the individual who later becomes injured. Brilmayer, Lea, "The Jurisprudence of Article III: Perspectives on the "Case or Controversy" Requirement", 93 Harvard Law Rev. 297, No. 2 (1979). Professor Brilmayer observed: "The justiciability requirements serve as procedural safeguards for the important liberal value of self-determination. Persons should not be able to assert the rights of others, even assuming they are good representatives, that is, likely to prevail on the merits. Standing to sue with its injury in fact requirement serves this protection." She cited *Gilmore v. Utah* 429 US 1012 (1976), in support of her point. There this Court denied Gary Gilmore's mother standing to fight the execution of her son, who wanted to die. *Schuppin v. Unification Church* 435 F. Supp 603 (D. Vt.), *aff'd* 573 F2d 1295 (2d Cir. 1977) was another example of people

attempting to assert the rights of others, contrary to the wishes of the real party in interest. In that case, the court of appeals denied standing to parents who wanted their daughter removed from the Moonies. She did not want to leave. Professor Brilmayer concluded at p. 314:

> These are unusual cases, and not just because of the unusual preferences of the third parties involved. They are also unusual because it is rare, in cases where standing is denied, to have such complete information about the preferences of the person who would purportedly benefit...To abandon the case or controversy doctrines would be, in effect, to say that it is not important to find out who is personally affected and what their wishes are.

Similarly, in denying UNR's initial request for appointment of a legal representative, the district court observed that a "Peter John Robinson" desired to intervene, alleging that while he was exposed to asbestos, he had not contracted any disease, but might do so in the future. He opposed the appointment of the legal representative. *In Re UNR Industries, Inc.*, 29 B.R. 741, 743, n.1 (D.C. 1983). Thus, contrary to what the Seventh Circuit may believe, some Future Claimants might well prefer to take their chances and sue New UNR, or its insurers, instead of submitting their claims to a Trust.

The Seventh Circuit dismisses the jurisdictional issue by concluding that UNR's Plan ". . . was negotiated and approved by the undisputed, current creditors." 20 F.3d at 770. But this begs the question. How is it possible for existing creditors to use the courts to determine the rights of third parties not before the court? The fact that it was negotiated by existing creditors is precisely the point. Neither UNR nor its creditors had any standing to affect the rights of these unidentified potential claimants.

Judge Easterbrook speculates that the significant cost of insuring UNR against future asbestos claims means the injuries are imminent and concrete. *Id.* Certainly the insurability of a risk,

and the cost of the premium, are not synonymous with the courts' power to adjudicate under Article III.

None of the other cases cited in the Seventh Circuit's opinion are even marginally relevant to whether a "case or controversy", and thus jurisdiction, exists to include Future Claims in UNR's reorganization. *Boston & Maine Corp. v. Chicago Pacific Corp.*, 785 F.2d 562 (7th Cir. 1986) and *In re Iowa R.R.*, 840 F.2d 535 (7th Cir. 1988) both hold that a creditor cannot set off its post bankruptcy obligation for railroad interline balances against a prebankruptcy debt for interline balances owed by the debtor. If anything, these cases support Workers. In *Boston*, the court of appeals stated:

> A corporate reorganization is fundamentally a process of dividing assets among the firm's creditors on the day of bankruptcy...bankruptcy draws a line between the existing claims to a firm's assets and newly-arising claims. Existing claims are divided according to the contractual rights of the claimants.[citation omitted]. If there are not enough assets to go around, some claims may be written down or extinguished. The ongoing operations of the business are treated entirely differently; *new claims are paid in full as they arise.* 785 F.2d 565 (Emphasis added).

Boston and the other cases cited in the Seventh Circuit's Opinion reflect a fundamental respect for the difference between a prepetition bankruptcy claim and a future claim.[9] As noted

[9]It often seems as if the Opinion ignores that the claims arising following UNR's bankruptcy will include true future claims, i.e., exposure and injury from an old UNR product that does not occur until after the Plan. And even though state law treats claims as arising at the time of injury, and thus opening the door to thousands of future claims to be pressed against UNR, the Opinion appears to improperly dismiss state law and determine for itself that any claim resulting from an older UNR asbestos product, no matter when the injury arises, causes that claim to arise prepetition. By apparently making this assumption, the panel sees no constitutional difficulty in dealing with the claims. However, state law does not hold that such claims arose before the bankruptcy and state law, as opposed to federal, defines the nature of a creditor's property interest in bankruptcy.

above, if an entity emerges from bankruptcy, it must pay the new claims which arise in full. These cases in no way support the method employed by UNR, which is to select certain types of new, or future claims, for inclusion in a limited pot to be divided with existing creditors.

While the treatises cited by the Seventh Circuit may argue that Future Claimants should be included in a reorganization[10] for policy purposes, they did not offer any solution to the Constitutional limits on the federal courts' power to grant UNR the relief it wants regarding Future Claimants. Similarly, the Seventh Circuit's opinion focuses entirely on policy as opposed to requirements of the law, which it terms "details". 20 F.3d at 771.

3. The Seventh Circuit's Holding That Future Claims May Be Included in the Bankruptcy Code's Definition of "Claim" Conflicts With Other Circuits

Aside from the Article III barrier, every court of appeals confronting the issue directly has disagreed with the Seventh Circuit's view that estimates of future tort injuries are "claims" as defined in the Bankruptcy Code. *See*, 11 U.S.C. § 101(5). The Seventh Circuit's holding conflicts with the Third and Fifth Circuit Court of Appeals, and dictum from the Second Circuit. *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936 (3rd. Cir.), *cert. denied sub nom.*, *Reading Co. v. Schweitzer*, 474 U.S. 864 (1985); *Remington Rand Corp.*, 836 F.2d 825, 832, note 7 at 833, (3rd Cir. 1988); *In re Mooney Aircraft*, 730 F.2d 367, 375 (5th Cir. 1984); *In re Chateaugay Corporation*, 944 F.2d 997 (2d Cir. 1991).

---

[10]Thomas H. Jackson, *The Logic and Limits of Bankruptcy Law*, pp. 47-54 (1986), (Jackson does not even mention or discuss whether the court would have jurisdiction under Article III; his book appears limited to justifying and advocating certain results on policy grounds.) Mark J. Roe, *Bankruptcy and Mass Tort*, 84 Colum. L. Rev. 846 (1984).

At about the same time the Seventh Circuit issued its opinion in this case, the Fifth Circuit reiterated its view that the future tort liability of a company is not a "claim" under the Bankruptcy Code when the victims are unidentified—as in this case. *Lemelle v. Universal Mfg. Corp.*, 18 F.3d 1268 (5th Cir. 1994). As a result, a clear conflict among the circuits exist which should be resolved. Even if this Court decides that the federal courts have the power to resolve mass torts in bankruptcy, individuals holding claims will span across state and circuit court lines. The meaning of claim in § 101(5) of the Bankruptcy Code, in the context of tort injuries, needs to be uniform among the circuits.

X. Conclusion

For the reasons stated herein, Workers request this Court to grant its Petition For A Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit.

Respectfully submitted,
UNARCO BLOOMINGTON
FACTORY WORKERS,
Petitioners

By:

PAMELA S. HOLLIS
(Counsel of Record)
HOLLIS & JOHNSON
1 Quincy Court
Suite 1204
Chicago, Illinois 60604
312-427-0700

JAMES WALKER
JAMES WALKER LIMITED
Box 3455
Bloomington, Illinois 61702
309-828-5044
Counsel for Petitioners